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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACK C. STOLLER,

Petitioner,

v.

JOHN O. MARSH, JR.,

Respondent.

PETITION OF JACK C. STOLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In affirming in part and reversing in part the District Court's grant of defendant's motion for summary judgment in a Title VII case, may the appellate court resolve the question whether the federal employer's conduct amounted to a continuing violation when that issue had never been considered by the District Court, or should the Court of Appeals have remanded the case to the trial court for a determination of that, and other, disputed issues of material fact?

2. Is the Circuit Court's view of the doctrine of continuing violation in Title VII cases, as expressed in its opinion in this case, so far at variance with the view of another Circuit Court on this doctrine that the exercise of this Court's power of supervision is appropriate to ensure the adequacy and fundamental fairness of the judicial process in Title VII litigation?

3. Does the Circuit Court's sanction of the District Court's refusal to grant reconsideration under Rule 60(b), Federal Rules of Civil Procedure, deprive plaintiff of his right to due process of law where, after submission of the case to the District Court on motion for summary judgment, the District Court's decision in another case involving the same defendant gives rise to a different legal theory of recovery based upon the same facts?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JACK C. STOLLER,

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JOHN O. MARSH, JR.,

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PETITION OF JACK C. STOLLER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Jack C. Stoller, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of

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[1] There were no other parties to the proceedings below. Clifford L. Alexander, Jr., then Secretary of the Army, was the named defendant in the District Court. Since the filing of the Complaint, Mr. Alexander was replaced by Mr. John O. Marsh, Jr., as Secretary of the Army, and Mr. Marsh was substituted as defendant herein pursuant to Rule 25(d), Federal Rules of Civil Procedure (hereinafter FRCP).

Appeals for the District of Columbia Circuit entered in the above case on June 22, 1982. That decision affirmed in part and reversed in part the judgment of the United States District Court for the District of Columbia granting the defendant's motion for summary judgment and dismissing the case, which order was entered April 30, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, 2a-22a) is reported at 682 F.2d 971. That Court's order entered August 30, 1982, denying appellant's petition for rehearing (App. A, 1a), is unreported. The memorandum opinion of the District Court (App. E, 31a), entered May 6, 1981, in support of its order granting the defendant's motion to dismiss, or in the alternative for summary judgment, is unreported, as is the District Court's order denying plaintiff's motion for reconsideration, which order was entered May 22, 1981 (App. C, 23a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, exercising jurisdiction pursuant to 28 U.S.C. 1291, was entered on June 22, 1982. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 717(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16(a), provides in pertinent part:

> All personnel actions affecting employees or applicants for employment . . . in executive agencies

(other than the General Accounting Office) as defined in section 105 of title 5 . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Petitioner, Jack C. Stoller, was employed by the Department of the Army as a Civilian Personnel Management Specialist in the Department of the Army Career Program for Civilian Personnel Administration (hereinafter DA Career Program). Prior to obtaining his Army position, he had a similar job with the Navy Department. In March, 1967, he arrived in Saigon, Republic of Vietnam, to begin employment as a Civilian Personnel Management Specialist, Grade GS-11. Prior to his departure for Vietnam, he was advised that the normal and expected tour of duty for employees in Vietnam in positions analogous to his was of five years' duration, but that he would be eligible for home leave to see his family once every year. The vehicle for accomplishing these home leave trips was the execution of a document called "Renewal Agreement – Travel."

As soon as Petitioner arrived in Vietnam, he was subjected to a continuing barrage of hostile words and acts by certain of his co-workers and superiors in the Army's Civilian Personnel Directorate.

On his arrival in Saigon, he was not met and greeted at the airport, although it was his office's stated official policy to do so. He was made to stay for an unusually long period of time in quarters which had been deemed inadequate by the Army. Some of his co-workers refused to speak with him, and spurned his offers of companionship. Other co-workers made embarrassing and derogatory comments about Jewish dietary laws,

which they believed the plaintiff observed. He was denied information about and access to the International Club, to which certain of his supervisors and co-workers belonged. He was harassed by co-workers who stacked furniture against his chair and desk while he was seated and working there, and who would stealthily creep behind him and yell and scream in his ears. In early 1968, he was denied a promotion to Grade GS-12 for which he was admittedly eligible, and better qualified than the individual who was actually selected. Most significantly, perhaps, and in possible explanation of this rather bizarre series of occurrences, at a social gathering of his supervisors and co-workers, which Petitioner attended, one Robert Hall, a co-worker, was asked whether Petitioner was "that kike Stoller." Another co-worker was told by one of Petitioner's supervisors not to associate with Stoller because he was a Jew. Petitioner was, he believes, the only Jew in the Saigon Area Civilian Personnel Office during the period of his assignment there, although the Army was unwilling to admit this during the discovery phase of the case in the District Court.

Stoller acknowledged, in the proceedings below, that he was not at that time aware that the behavior patterns displayed toward him related to the fact that he is Jewish, because, while he was in Vietnam, he did not personally overhear, nor was he then informed of, the anti-Semitic and discriminatory remarks that were made about him.

In the spring of 1968, Stoller was told that he would not be receiving a "Renewal Agreement—Travel," which meant that he could stay in Vietnam and not see his family for the foreseeable future, or return to the United States and then be ineligible to go back to Vietnam,

because of the absence of any such renewal agreement. Plaintiff, mystified and deeply disturbed by this development, approached a co-worker and asked him to arrange a meeting with Mr. William Moyers, then Respondent's Civilian Personnel Director in Vietnam, to ascertain why this approach was being utilized to prevent his remaining in Vietnam. Eventually, Moyers met briefly with Stoller, but no reasons were given to explain the action that was being taken against him.

Confronted with this Hobson's Choice, Petitioner returned to the United States, against his will, as the allegedly unlawful *de facto* reassignment from Vietnam reduced his total annual compensation from approximately $28,000 to $12,000. His reassignment was to a similar position at the Army Materiel Command, Alexandria, Virginia.

Some eight or nine months later, at the end of 1968, Stoller applied for overseas employment with the Army, which was denied. This was the first time that he was made aware, by defendant's employees, that there was something in writing to the effect that he was unable to get along with foreigners. In 1972, he was informed that the 1971 Career Screening Panel (hereinafter CSP) had placed him in a "deferred" category. This meant that he was not then promotable. In 1973, he learned that the 1972 CSP had placed him in a "promotable" category, but had not recommended him for promotion. His promotion to GS-13 was effected only after his supervisor wrote a memo requesting it, after which the CSP belatedly gave the promotion its imprimatur of legitimacy. After Petitioner returned to the United States, and after being turned down for any overseas assignment,

he learned of the existence of a secret "file" on him which was maintained by respondent's employees.[2]

In 1973, after reflecting on the entire history of the Army's treatment of him between 1967 and that time, Stoller concluded that all the adverse action taken against him was attributable to religious discrimination originally occurring in Vietnam in 1967 and 1968, and the Army's continuing efforts at a "cover-up" of that unlawful discrimination.

On May 16, 1973, only two weeks after his belated promotion to GS-13, Stoller attempted to verify his new suspicion, and contacted the Army's Overseas Recruitment Center, which Center was a branch of the Army's Office of the Director of Civilian Personnel. He asked to see a list of names of those people who had been assigned to jobs in the Civilian Perosnnel Office in Vietnam from 1968 on. When this request was refused, Stoller immediately made an informal written complaint to an EEO counselor. Then, when the matter was not resolved informally, he filed his formal administrative complaint on June 14, 1973.

A lengthy administrative investigation was conducted. A panel of the (then) Civil Service Commission's Appeals Review Board, in May, 1978, affirmed the Complaints

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[2] The Army has never admitted the existence of this file, and, in the District Court, resisted all plaintiff's efforts to ascertain the current address of a witness, Miss Almeida Huddleston, who made a sworn statement in the administrative proceeding herein that it existed. Stoller testified at his deposition that at a June 1969 meeting with Mr. William R. Bruce, who was then exercising supervisory responsibility over him vis-a-vis the Career Program, Bruce had a file containing what appeared to be several documents, one of which he quoted from, but which he refused to let Stoller see, clutching the file to his chest at one point to ensure that the contents thereof remained "secret"—at least from Petitioner.

Examiner's decision that there had been no unlawful discrimination, although the Examiner's Report acknowledged the "atmosphere of discrimination" to which Petitioner had been subjected while in Vietnam, and recommended corrective action. Within thirty days of the Board's decision, Jack Stoller filed the lawsuit which is the subject of this Petition.

Just as the discovery phase of this case was being completed in the trial court, defendant filed its motion to dismiss or, in the alternative, for summary judgment, in March 1980. Plaintiff's Opposition thereto, the Affidavit of Jack C. Stoller and a Statement of Genuine Issues were filed in April, 1980. The District Court granted summary judgment to the Government on all four of Stoller's claims.[3] (App. E, 30a).

On appeal, the Court of Appeals, *per* Judge Wright, affirmed the District Court's judgment on Stoller's first three claims, but further ruled that summary judgment was improper on Stoller's fourth (1972) claim. Stoller filed a timely Petition for Rehearing, which was denied without opinion on August 30, 1982 (App. A, 1a).

REASONS RELIED ON FOR GRANTING THE WRIT

The decision of the Court of Appeals for the District of Columbia Circuit, in itself resolving the question whether the Army's treatment of Stoller between 1967 and 1973 amounted to a continuing violation of Title

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[3] (1) The 1968 refusal to allow him to complete his normal tour in Vietnam; (2) the denials in 1969 and 1970 of his applications for overseas assignment; (3) the 1971 Panel's decision that he was ineligible for promotion; and (4) the 1972 Panel's restriction of his promotional opportunities. Complaint at 3.

VII, without remanding the case to the District Court for requisite factual determinations, is violative of basic and well-established teachings of this Court, as enunciated in *Pullman-Standard v. Swint*, ___ U.S. ___, 102 S. Ct. 1781 (1982), *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), and *Fountain v. Filson*, 336 U.S. 681 (1949).

As the Court of Appeals decision does not recognize, the District Judge never resolved the issue whether Respondent's treatment of Stoller during the period in question constituted a continuing violation of his rights under Title VII (District Court's Memorandum, App. E, 31a).[4] Thus, the proper course for the Court of Appeals to have followed would have been to remand the case to the District Court for factual determinations under Rule 56(d), F.R.C.P., rather than to arrogate unto itself the role and function of the trial court in attempting to resolve the ultimate fact question in the case (whether the Army's treatment of Petitioner violated his rights under Title VII), and other disputed issues of material fact which had not been resolved prior to the trial court's granting summary judgment. Moreover, in treating questions of fact as questions of law, which Petitioner submits is essentially what the Court of Appeals panel did, one of the most basic tenets of our judicial system was ignored, in that the panel failed to view the facts, and inferences to be drawn therefrom, in the light most favorable to the party opposing the motion for summary

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[4] The only reference made by the District Judge to the issue whether the Army had committed a continuing violation is found at App. E, on p. 34a of the Court's memorandum, where the judge merely took note of the fact that Stoller had alleged a continuing violation.

judgment, *contra* to the teaching of *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

The decision below also appears to create a conflict in the federal judicial circuits as to the question whether the ongoing operation of a federal employer's discriminatory personnel management program will be deemed a continuing violation of Title VII for whatever period of time the program remains in effect. The Fourth Circuit decided, in *Chisholm v. United States Postal Service*, 665 F.2d 482 (4th Cir. 1981), that the programmatic aspect of the employer's promotion practices meant that the violation would be deemed continuing, so as to permit recovery for violations occurring before March 24, 1972 (the effective date of the Title VII amendments which extended the forum and procedures of the Civil Rights Act to federal employees) by employees who had no discrimination claims pending on that date. The Court of Appeals decision in the instant case is not only sharply at variance with *Chisholm*, but also represents a departure from the preexisting law of the circuit, as exemplified by Shehadeh m m m m m m m m m m m 193 U.S. App. D.C. 326, 595 F.2d 711 (D.C. Cir. 1978).

Finally, the District of Columbia Circuit's opinion decided an important question of federal law which has not as yet been, but should be, settled by this Court—to wit, whether a motion for reconsideration under Rule 60(b), F.R.C.P., is an acceptable method for seeking to amend a complaint where new decisional law gives rise to a previously unknown legal theory of recovery based on preexisting facts. The court below answered this question in the negative, in a manner which apparently conflicts with Court of Appeals decisions in the Third (*Holton v. Crozer-Chester Medical Center*, 560 F.2d 575 (3d Cir. 1977)), Fourth (*Patterson v. American Tobacco Co.*, 586 F.2d 300 (4th Cir. 1978)), and Fifth

(*Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646 (5th Cir. 1978)) Circuits.

I.

AFTER PARTIALLY REVERSING THE JUDGMENT OF THE TRIAL COURT, THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THAT COURT FOR RESOLUTION OF THE CONTINUING VIOLATION QUESTION AND OTHER DISPUTED ISSUES OF MATERIAL FACT, RATHER THAN ATTEMPTING TO RESOLVE THOSE ISSUES ITSELF ON AN INADEQUATE RECORD.

Although the *Pullman-Standard* case, *supra*, involved Rule 52, F.R.C.P., and this case involves Rule 56, the governing principle is, and ought to be, the same. This Court there directed that where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits of only one resolution of the issue (102 S. Ct. 1781, 1792; *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974)).

Numerous significant factual issues were in dispute at the time the Army's motion for summary judgment was granted. Stoller maintained that Mr. William Bruce informed the 1971 and 1972 CSPs of information contained in the secret file. Respondent denies this, and also denies the existence of any such file.

Mr. Virgil E. (Gene) Stephens, a fellow employee of plaintiff's in Vietnam, submitted an affidavit in the administrative proceeding in this case stating that he had heard several of plaintiff's supervisors use ethnic (religious) epithets against plaintiff. As noted in plaintiff's Statement of Genuine Issues submitted in the District Court, the Army seems even to be denying that the affidavit was in fact Mr. Stephens'.

During the course of the administrative proceeding, Mr. Robert Hall, another of Stoller's co-workers in Vietnam, testified that one of his (Hall's) superiors in the civilian hierarchy advised him not to associate with Stoller because he was a Jew. Although the Army admitted that Mr. Hall so testified, it denied that the testimony was truthful.

These examples have been included to show that there were many issues of material fact which remained in dispute at the time the District Court granted the summary judgment motion. The Court of Appeals acted improperly in attempting to resolve them. *DeMarco v. United States,* 415 U.S. 449 (1974). Resolution of fact issues, including the proper inferences to be drawn from the facts, should be made by the trial court. *General Electric Credit Corp. v. Robbins,* 414 F.2d 208, 211 (8th Cir. 1969). "It is not the function of this court to make findings of fact which a trial court should have made." *Yanish v. Barber,* 232 F.2d 939, 946 (9th Cir. 1956). *Campbell v. Campbell,* 83 U.S. App. D.C. 237, 170 F.2d 809 (D.C. Cir. 1948); 5A Moore's Federal Practice ¶ 52.06[2].

The significance of *Fountain v. Filson, supra,* to the case at bar cannot be over-emphasized, and represents the controlling precedent by which the Court of Appeals' action here should be judged. In that case, this Court held that where the only claim considered by the District Court on defendant's motion for summary judgment was a claim that there existed a resulting trust, and the Court of Appeals concluded that the District Court should have considered a personal injury claim, the Court of Appeals erred in depriving defendant of the opportunity to dispute facts which were material to the personal injury claim by ordering summary judgment against defendant.

The Court of Appeals committed the same error here as it did in *Filson*—by concluding that the facts as they existed of record at the time the District Court granted the summary judgment motion did not support plaintiff's allegations that the operation of the DA Career Program amounted to a continuing violation, the Circuit Court effectively deprived Stoller of the opportunity to have that issue resolved by the tribunal properly charged with resolution of disputed factual issues. The Court of Appeals' resolution of the question by fiat is particularly egregious in view of the fact that the District Court had not considered the continuing violation question while the matter was pending in that court.

Pages 7 and 8 (Slip Opinion) of the opinion below (App. B, 8a & 9a) state the panel's conclusion that Stoller's allegations concerning the secret file, even if proven, would not establish a continuing violation of Title VII, in that "they do not adequately link four separate episodes of alleged discrimination into a single, continuous policy" (8a). The discussion which follows and attempts to support this conclusion, however, appears to be a series of factual, not legal, assertions. In resolving these issues of fact in a manner adverse to Petitioner's assertions, the appellate tribunal has itself violated the precepts of *Adickes v. S. H. Kress & Co., supra,* where this Court reaffirmed its holding in *Diebold, supra,* that on summary judgment, the inferences to be drawn from the underlying facts contained in matters in evidence in the trial court must be viewed in the light most favorable to the party opposing the motion (398 U.S. 144, 158-59: "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted", *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962)).

Petitioner submits that the Court of Appeals' opinion here goes through the motions of saying that the panel has accepted the most favorable view of Petitioner's allegations, but in the proverbial next breath it refutes that by resolving adversely to the Petitioner questions which were hotly contested and unresolved during discovery in the trial court.

In conclusion, in the words of the *Poller* Court's opinion, "it may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that 'it is quite clear what the truth is.'" 368 U.S. 464, 472.

II.

THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS AS TO WHETHER THE ONGOING OPERATION OF A FEDERAL EMPLOYER'S DISCRIMINATORY PERSONNEL MANAGEMENT PROGRAM WILL BE DEEMED A CONTINUING VIOLATION OF TITLE VII FOR WHATEVER PERIOD OF TIME THE PROGRAM REMAINS IN EFFECT.

As previously noted, the Court of Appeals' opinion states that even if Petitioner were to prove his allegation that a secret file was created to cover up the Army's illegal action in removing him from Vietnam, and then was used to deny him overseas assignments from 1969 on, promotable status in 1971 and a promotion in 1972, it would not establish a continuing violation of Title VII, as there would still be no adequate linkage of four separate episodes of alleged discrimination into a single, continuous policy. Petitioner submits that this conclusion fails to adequately take into account the nature and functioning of the DA Career Program in which Stoller

was enrolled continuously from the time he first became an Army employee in 1967.

The Department of the Army Career Program for Civilian Personnel Administration was established in 1959 for the purpose of institutionalizing merit placement and promotion of civilian employees. As the program operated in the late 1960s and early 1970s, the relevant time frame in this case, DA Career Program employees did not apply for position vacancies in which they were interested. In fact, the Army neither advertised nor posted promotional opportunities for grades GS-13 through GS-15 in the civilian personnel administration career field. The administration of the Career Program was more closely analogous to that of the officer corps of the military services than it was to a large corporation in the private sector of the economy. Position vacancies were frequently unknown to employees who might have been potential applicants therefor. A particular Department of the Army office which had a civilian personnel vacancy would notify a headquarters office and would receive a list of "best qualified" employees, from which list the position vacancy would be filled. Without the imprimatur of the CSP that a particular employee was eligible for promotion to a certain grade level, there was no way in which that employee could ever get his name on a "best qualified" list for jobs at that level, and therefore would never be "fleeted up," in Navy parlance, to a higher level job. The system was a completely closed one, and end runs around it were virtually impossible.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court proscribed employment practices "fair in form, but discriminatory in operation." As respected Title VII practitioners have concluded, the phrase "discriminatory

in operation" must be construed as equivalent to "perpetuates the consequences of forbidden discrimination."[5] The existence of a secret file, or dossier, on Jack Stoller, initially prepared as *post hoc* justification for the Army's violations of its own regulations in reassigning him from Vietnam, but subsequently perused by DA Career Program managers when considering him for overseas assignments and by members of the 1971 and 1972 CSPs when assessing his suitability for promotion would, if proven, unquestionably establish what amounts to a classic case of continuing discrimination. In Petitioner's view, to find the annual CSP decisions "discrete" is to effectively preclude the possibility of ever again finding that the operation of the DA Career Program was discriminatory as to anyone.

In the instant case, the series of discriminatory acts was indeed related by reason of the fact that Petitioner's illegal reassignment from Vietnam, the refusal to consider him for overseas assignments and 1971 CSP refusal to declare him eligible for promotion were all actions taken against him by DA Career Program managers under the aegis of that Program. Petitioner believes that it is the programmatic aspect of the actions taken against him which warrants this Court's most careful scrutiny.

The District of Columbia Circuit has found a continuing violation when an employer engaged in a persistent practice of issuing false, discriminatory references to prospective employers of a former employee (*Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711, 719, 725 (D.C. Cir. 1978)). The plaintiff in *Shehadeh*

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[5] Jackson and Matheson, "The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits," 67 Geo. L. J. 811, 821 fn. 60 (1979).

alleged a "long-lasting pattern of like events," possibly as many as two hundred discriminatory reports by the same group of personnel. In the Stoller case, the single thread which binds together the pre- and post-1972 acts complained of is the fact that the Career Program administrators and CSP decision makers continuously utilized the discriminatorily motivated secret file (or misinformation contained therein or extracted therefrom) in making program decisions which injured Stoller every time promotional opportunities or overseas vacancies came up. By analogy to *Shehadeh*, Petitioner estimates, and believes he could prove, that there were well in excess of two hundred civilian personnel specialist position vacancies and overseas assignment opportunities which were filled under the Career Program between 1969 and 1972. This case, like *Bethel v. Jefferson*, 598 F.2d 631 (D.C. Cir. 1978), involves "not an assortment of unrelated happenings, but a chain of connected events." 598 F.2d 631, 636.

Judge Wright's opinion for the Circuit Court panel, at the top of page 8 (Slip Opinion) (App. B, 9a) purports to distinguish the facts in *Shehadeh* from those in this case. Petitioner respectfully urges that the question whether the facts of this case are so similar to those in *Shehadeh* that the holding of that case must control here is a disputed factual issue which the Court of Appeals resolved by fiat, based on the panel's own idea of what the facts in this case were.

The decision below appears to create a conflict with the Fourth Circuit's decision in *Chisholm v. United States Postal Service, supra*, a class action which was brought by black employees of the Postal Service seeking injunctive relief and monetary compensation on the basis of allegations of racial discrimination in promotions on

the part of the employer. The Fourth Circuit conducted a detailed review of the promotional policies of the USPS in Mecklenburg County, North Carolina, and concluded that the programmatic aspect of the employer's promotion policy (665 F.2d 482, 495 n.18) compelled a finding that the employer had committed Title VII violations of a continuing nature (*id.* at 490, n.11).

This conflict between the decision below and the *Chisholm* case should be resolved by this Court.

III.

CERTIORARI SHOULD BE GRANTED TO SETTLE THE QUESTION WHETHER A MOTION FOR RECONSIDERATION BROUGHT UNDER RULE 60(b), F.R.C.P., MAY BE USED TO AMEND THE COMPLAINT WHERE NEW DECISIONAL LAW GIVES RISE TO A DIFFERENT LEGAL THEORY OF RECOVERY BASED UPON PREEXISTING FACTS.

When this case was pending in the U.S. District Court, defendant filed its motion to dismiss or, in the alternative, for summary judgment, on March 5, 1980. A supplement to defendant's motion was served on plaintiff on March 13, 1980. Plaintiff's Opposition to defendant's motion, containing a Statement of Points and Authorities, the Affidavit of Jack C. Stoller, and a Statement of Genuine Issues, was filed on April 11, 1980. On April 18, 1980, one week after the case at bar was submitted to the District Court on motion and opposition thereto, District Judge Aubrey E. Robinson, Jr., decided *Clark v. Alexander,* 489 F. Supp. 1236 (D.D.C. 1980). In that case, a retired Department of the Army employee brought a Title VII action alleging, *inter alia,* that she was deprived of equal opportunity for training, development, lateral reassignment and promotion under the Department of the Army Career Program for Civilian

Personnel Administration because of gender. The District Court held that the Army's Office of Employment Policy and Grievance Review (hereinafter OEPGR) employees were victims of prohibited discriminatory employment practices. 489 F. Supp. 1236, 1246.

> Moreover, the statistics and trial testimony indicate beyond doubt that the DA refused and continues to refuse to promote qualified women to high level policy making positions. The system, by providing the personnel boards with unfettered discretion, had and has a disparate impact upon classes of people protected by Title VII, viz. women and OEPGR employees. Not only did Plaintiff establish a prima facie case of discrimination, *McDonnell Douglas Co. v. Green, supra,* but she easily met her ultimate burden of proof. *Furnco Construction Co. v. Waters, supra.* The pervasive systemic defects inherent in the Career Program operated and continue to operate to discriminate against women, who have suffered from prior discriminatory employment practices, and OEPGR staff who enforce the EEOA. Although the system is facially neutral, disparate impact runs rampant in the DA Career Program. *Griggs v. Duke Power Co., supra*; *Teamsters v. U.S., supra.*

489 F. Supp. 1236, 1246.

Jack Stoller was an OEPGR employee whose duties included enforcement of the Equal Employment Opportunity Act from November, 1970 to August, 1978, within which time frame the *Clark* court found the Army's discriminatory practices were operating against OEPGR employees. It was also during this period that Stoller was attempting to obtain overseas employment (1970) and was delcared not promotable by the 1971 CSP, effectively the Program's promotional decision-

makers (these were the second and third claims of discrimination in Petitioner's District Court complaint).

Petitioner's Memorandum of Points and Authorities in support of his Motion for Reconsideration, filed May 8, 1981 (App. D, 27a-29a) pointed out to the trial court that as plaintiff was unaware of his status as a member of a class against which the Army's Career Program was operating discriminatorily (*i.e.*, OEPGR staff who enforced the EEOA), as the District Court had held in the *Clark* case, he was not in a position to allege that when he filed his complaint in this case. Accordingly, plaintiff asked the District Court to reconsider its ruling that the defendant was entitled to summary judgment, and grant plaintiff leave to amend his complaint. Plaintiff's motion was denied on May 22, 1981 (App. C, 23a).

The *Clark* case was appealed by the Government (*Clark v. Marsh*, 214 U.S. App. D.C. 350, 665 F.2d 1168 (D.C. Cir. 1981)), but on appeal the Secretary of the Army alleged no error in the District Court's findings of discrimination (665 F.2d 1168, 1171).

District Judge Robinson's opinion in *Clark* is particularly germane to Petitioner's case because of the finding that "It is abundantly clear in the instant litigation that the DA Career Program, as evinced by the regulatory violations, the resentment of OEPGR staff by personnel officers, and the dearth of referrals to qualified participants such as plaintiff, served to perpetuate past discrimination." 489 F. Supp. 1236, 1247. Ms. Clark was able to show that she had been discriminated against by the Army because she was female, and the Career Program perpetuated that discrimination. Jack Stoller sought the opportunity to show that he was discriminated against because he is Jewish, and the Career Program perpetuated that discrimination. Thus, appellant did

not intend to utilize the *Clark* case as a vehicle for introducing entirely new claims. The claim in this case has always been the same—that Stoller was discriminated against because he is a Jew.

The opinion below points out that Petitioner had not previously pursued administrative remedies for discrimination against him because of his OEPGR status. This observation misses the salient feature of the *Clark* holding—the recognition of a class of protected Army employees, of which class Stoller was a member. Until the *Clark* decision was rendered, that protected class did not exist as a legal entity, so it was obviously impossible for him to avail himself of it. Although Stoller was aware, of course, that he was an OEPGR employee from November, 1970 to August, 1978, he was equally obviously unaware of the fact that a federal court had found that, as a member of that staff whose duties included enforcement of the EEOA, the discrimination he had suffered as a Jew under the Army's Career Program was being perpetuated by his status as an OEPGR employee.

The opinion of the court below, in its consideration of the trial court's denial of Petitioner's Motion to Reconsider, states that the findings in *Clark* regarding discrimination against OEPGR staff are not relevant to the issues of religious discrimination in this case. Here again, the Court of Appeals panel is treating a question of fact as a question of law, in improperly substituting its judgment for that of the finder of fact, and doing so upon a record in which Stoller's status as a member of the OEPGR staff is barely mentioned.

Because of the fact that this case had never reached the trial stage in the District Court, therefore making Rule 59, F.R.C.P., inapplicable, Petitioner's counsel

found it necessary to bring the motion for reconsideration under the rubric of Rule 60. Although most opinions construing Rule 60(b)(6) speak in terms of newly discovered facts or evidence (*Harjo v. Andrus*, 189 U.S. App. D.C. 171, 581 F.2d 949 (D.C. Cir. 1978); *Good Luck Nursing Home, Inc. v. Harris*, 204 U.S. App. D.C. 300, 636 F.2d 572 (D.C. Cir. 1980)), there is a substantial body of case law to the effect that the Rule is available to bring to the trial court's attention any information which is central to the litigation and which indicates that the court's initial decision may be unjust (*In the Matter of Emergency Beacon Corp.*, 666 F.2d 754 (2d Cir. 1981); *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977)). The motion for reconsideration was also an attempt to acquaint the District Court with Petitioner's view of the relationship between the instant case and the *Clark* case through oral argument, as there had been no such argument prior to that Court's ruling on the Government's motion to dismiss, despite Petitioner's expectation that there would be.[6]

In cases factually very similar to the case at bar, the Third Circuit has held (*Holton v. Crozer-Chester Medical Center, supra*; *Lair v. Fauver*, 595 F.2d 911 (3d Cir. 1979)) that where a complaint has been dismissed and another court, which need not necessarily be a higher court, or even the same court in the same or a related proceeding, has decided a question in a manner which sheds light on issues raised in the case where the dismissal has been entered, the order of dismissal should

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[6] "Where facts material to a jurisdictional time limit are in dispute, both fairness and analogy to Rules 12(b)(6) and 56 require that the court provide the parties a full opportunity to air their factual dispute." *Gordon v. National Youth Work Alliance*, 675 F.2d 356, 360 (D.C. Cir. 1982).

be vacated and the case remanded to the trial court to permit it to reconsider its ruling in light of the new law, or for consideration of a motion to amend the complaint. *Patterson v. American Tobacco Co., supra,* in the Fourth Circuit, is to the same effect, although in that case it was a decision of this Court which intervened between the federal district court's initial decision on the merits and the denial of motions for relief from judgment. *Patterson* is of the utmost significance here because it stands for the proposition that where a Rule 60(b) motion has been denied and the trial court is subsequently made aware of new law which directly affects the case, it is obligated to fully comply with the fact-finding requirements of Rule 52, F.R.C.P. This was part of the relief which Petitioner requested in his motion for reconsideration in the District Court when he requested oral argument on the motion (App. D, 25a), which request was denied (App. C, 24a).

The Fifth Circuit, in *Concerned Citizens of Vicksburg v. Sills, supra,* restated and there applied the well-established principle that an appellate court "is obligated to take notice of changes in fact or law occurring during the pendency of the case on appeal which would make a lower court's decision, though perhaps correct at the time of its entry, operate to deny litigants substantial justice." 567 F.2d 646, 649, quoting *Hawkes v. IRS,* 467 F.2d 787, 793 (6th Cir. 1972). In remanding to the District Court for a factual determination as to whether a predicate for federal jurisdiction in that case continued to exist, the Fifth Circuit's opinion went on to state:

> In such cases, "where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the District Court an opportunity to pass on the

changed circumstances". *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972).

567 F.2d 646, 650.

Petitioner submits that the court below should have followed this line of authority, and should have remanded the instant case to the trial court for a full factual determination as to the relationship between the *Clark* decision and the case at bar.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1981

No. 81-1721
Civil Action No. 78-01032

[Filed: August 30, 1982]

Jack C. Stoller,
Appellant

v.

John O. Marsh, Jr.,
Secretary of the Army

Argued: 3-24-82

Before: *Bazelon,* Senior Circuit Judge, *Wright* and *Edwards,* Circuit Judges.

ORDER

On consideration of appellant's petition for rehearing, filed August 6, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

For the Court

George A. Fisher, Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1721

JACK C. STOLLER, APPELLANT

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 78-01032)

Argued March 24, 1982

Decided June 22, 1982

Judgment entered this date ←

Roy Tesler for appellant.

Alice Patricia Frohman, Assistant United States Attorney, with whom *Charles F. C. Ruff*, United States Attorney at the time the brief was filed, and *Kenneth M. Raisler*, *Royce C. Lamberth*, and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief, for

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

appellee. *Scott T. Kragie*, Assistant United States Attorney, entered an appearance for appellee.

Before WRIGHT and EDWARDS, *Circuit Judges*, and BAZELON, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: In this Title VII action the District Court granted summary judgment in favor of defendant Marsh, Secretary of the Army, on each of plaintiff Stoller's four claims. We affirm the District Court's judgment on Stoller's first three claims, based on separate personnel actions in 1968, 1969, and 1971, because the court lacked subject matter jurisdiction over these pre-1972 actions by the federal government. Summary judgment was improper, however, on Stoller's fourth claim, arising from the Army's failure to promote him in 1972. Genuine issues of material fact remain unresolved and the government was not entitled to judgment as a matter of law. An unfavorable employment decision resulting from inaccurate, discriminatorily-motivated evaluations by the employee's supervisors violates Title VII, unless the employee previously had a reasonable opportunity to inspect the personnel file and have the evaluations corrected. We therefore reverse and remand for further proceedings on the 1972 claim.

I

From March 1967 to April 1968, Jack Stoller served in Saigon, Republic of Vietnam, as a civilian personnel management specialist (GS-11) in the Department of the Army. He asserts that during his period of service in Vietnam he suffered harassment and unequal treatment but did not then realize that these episodes were anti-Semitic. In 1968, after one year in Vietnam, Stoller was reassigned to the United States, although he desired to remain overseas in order to obtain higher pay and benefits. He contends that he was entitled to a five-year tour

of overseas duty, but that his superiors arranged for his transfer for discriminatory reasons. Stoller's superiors reported that he was unable to work harmoniously with Vietnamese people. Joint Appendix (JA) 27. Stoller asserts that this report was false.

In January 1969 Stoller applied for overseas employment within the Department of the Army. His application was denied. In 1971 the Career Screening Panel reviewed Stoller's record, along with the records of more than 800 other civilian personnel, and placed him in a deferred category on the ground that he was ineligible for promotion. Stoller was informed of this decision in May 1972. He did not file any administrative charges of discrimination after the 1968 reassignment, the 1969 denial of overseas employment, or the 1971 Career Screening Panel decision.[1]

Subsequently the 1972 Career Screening Panel placed Stoller in the promotable category for positions in his field of specialty. The panel did not, however, recommend him for promotion. Within 30 days after he was informed of the panel's decision in May 1973, Stoller initiated administrative proceedings under Title VII. He sought redress not only for the 1972 screening panel's decision but also for the three pre-1972 personnel actions.

The administrative proceedings continued from 1973 to 1978. After a lengthy investigation, the Civil Service

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[1] Even before Title VII was amended in 1972 to apply to federal government employees, the government provided administrative remedies for discrimination on the basis of race, color, religion, sex, and national origin. Under Executive Order No. 11375, 32 Fed. Reg. 14303 (1967), federal agencies and departments were required to provide procedures for investigating and deciding discrimination complaints by employees. *See* 5 C.F.R. §§ 713.211-.236 (1970) (requiring agencies to establish equal employment opportunity programs including counseling, investigation, and hearing of complaints, with appellate review by Civil Service Commission).

Commission complaints examiner found that, although there was an "atmosphere of discrimination" during Stoller's period of service in Vietnam, the Army had not discriminated against him in violation of Title VII. That decision was affirmed by the Appeals Review Board in May 1978. Stoller filed this lawsuit in the District Court within 30 days after the review board's decision.

Stoller alleged that the Army had violated Title VII by discriminating against him on the basis of his "religion (Jewish) and national origin (semite)[.]" His complaint asserted that the Army "has discriminated and is continuing to discriminate against the Plaintiff in each of the following ways": (1) the 1968 refusal to allow him to "complete his normal tour in Vietnam"; (2) the denial of his application in 1969 for another overseas assignment; (3) the 1971 panel's decision that he was ineligible for promotion; and (4) the 1972 panel's restriction of his promotional opportunities. Complaint at 3. In opposition to the government's motion to dismiss, he contended that these four actions formed part of a pattern of "continuing discrimination" which began in Vietnam in 1968. He alleged that his Army superiors in Saigon, motivated by religious discrimination, improperly arranged for his reassignment to the United States after one year of duty and that, to justify this action, they manufactured a personnel file falsely asserting that he was unable to get along with Vietnamese people. This "secret file," he asserts, caused the subsequent adverse decisions in 1969, 1971, and 1972.

The District Court granted summary judgment for the government on all of Stoller's claims. With respect to the first three government actions, the court held that Stoller had failed to file timely administrative claims, even though the record showed that he was aware of the alleged discrimination. In the alternative the court held that it lacked jurisdiction over claims against the federal government based on acts prior to the effective date

of the 1972 amendments to Title VII. JA 13-14. The District Court also held that the 1972 screening panel's decision did not violate Title VII. In the court's view, Stoller was not complaining of a "present violation" by the 1972 panel; rather he was asserting that the panel failed to promote him "because of his past employment history." Relying on *United Air Lines v. Evans*, 431 U.S. 553 (1977), it concluded that Stoller could not prevail on his fourth claim. JA 14-16.

II

A. *Pre-1972 Government Actions*

The District Court granted summary judgment for the government on Stoller's three pre-1972 claims on the ground that he had failed to pursue administrative remedies in a timely manner. Stoller conceded that, until 1973, he did not file administrative charges regarding any of the pre-1972 government actions—reassignment to the United States in 1968, denial in 1969 of his application to work overseas, and placement by the 1971 screening panel in a deferred category. He claimed, however, that until May 1973 he did not suspect that his previous treatment had resulted from religious discrimination, and that the investigation uncovered episodes of discrimination of which he had not been aware. Statement of Points and Authorities in Opposition to Defendant's Motion to Dismiss at 4, 6-7 (hereinafter Opposition to Motion to Dismiss). Therefore, he maintains, the time limits were subject to equitable tolling.

Under Title VII, if an employee did not at the time know or have reason to know that an employment decision was discriminatory in nature, the time limits for filing an administrative complaint may be tolled.[2] *See*

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[2] The Supreme Court recently held that filing a timely charge of discrimination with the Equal Employment Opportunity Commission is not a jurisdictional prerequisite

Cooper v. Bell, 628 F.2d 1208, 1212 (9th Cir. 1980); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975). But in this case the District Court concluded that "the record demonstrates that the plaintiff was aware of the alleged discriminatory acts and could have filed timely claims. Thus, any argument that the time to file was tolled is also without merit." JA 14. We need not decide whether, at the summary judgment stage, the District Court properly concluded that there was no genuine issue of material fact about Stoller's knowledge of the alleged discrimination against him. We affirm the District Court's dismissal of the pre-1972 claims on jurisdictional grounds.

The 1972 amendments to Title VII, extending the statute's coverage to federal government employees, do not apply retroactively to discrimination prior to March 24, 1972, with the exception of two categories of cases. *Brown v. Turner*, 659 F.2d 1199, 1202 (D.C. Cir. 1981). Pre-1972 claims against the federal government are covered if a complaint was pending on the effective date of the Act, *Grubbs v. Butz*, 514 F.2d 1323, 1327 (D.C. Cir. 1975); *Womack v. Lynn*, 504 F.2d 267 (D.C. Cir. 1974), or if a continuing violation began before that date but extended after it, *Thompson v. Sawyer*, —— F.2d ——, —— (D.C. Cir. No. 80-2098, decided April 27, 1982) (slip op. at 58); *Bethel v. Jefferson*, 589 F.2d 631, 636-637 (D.C. Cir. 1978). Under these settled principles, the District Court lacked subject matter jurisdiction over Stoller's first three claims.

On March 24, 1972 no administrative proceedings were pending with regard to any claims of discrimination

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to suit, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, —— U.S. ——, 50 U.S.L.W. 4238 (Feb. 24, 1982).

brought by Stoller. His complaint in the District Court alleged in a conclusory fashion that the Department of the Army "has discriminated and is continuing to discriminate against the Plaintiff" and recited the government's actions in 1968, 1969, 1971, and 1972. Subsequently Stoller's memorandum in opposition to the government's motion to dismiss attempted to set forth a theory of continuing violation. He contends that, to cover up the allegedly discriminatory and procedurally irregular decision to reassign him to the United States after one year in Vietnam, his superiors created a "secret file" which was subsequently used by the Army to deny him an overseas assignment in 1969, promotable status in 1971, and a promotion in 1972. Opposition to Motion to Dismiss at 3-4, 10-13; *see* appellant's brief at 29. We conclude that these allegations, even if proven, would not establish a "continuing violation" of Title VII; they do not adequately link four separate episodes of alleged discrimination into a single, continuous policy.[8]

Stoller's reassignment from Vietnam in 1968 is separate and distinct, for Title VII purposes, from the placement of allegedly false papers into his personnel file. *Cf. Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 718-719, 723 (D.C. Cir. 1978) (although charges regarding 1968 discharge would have been untimely, allegations of subsequent discriminatory references by former employer were timely because "sufficiently distinct" from the original termination).

The subsequent decisions in 1969, 1971, and 1972 did not *ipso facto* become part of a "continuing violation" because Stoller alleged that they were based on the same personnel file. This court has found a continuing viola-

[8] Even if a complaint refers to a "continuing violation," the court lacks subject matter jurisdiction over pre-1972 claims unless the facts alleged would constitute continuing discrimination if proven. *See Myles v. Schlesinger*, 436 F.Supp. 8, 14 (E.D. Pa. 1977).

tion when an employer followed a systematic discriminatory policy with respect to a class of employees,[4] when an employer allegedly engaged in a persistent practice of issuing false, discriminatory references to prospective employers of a former employee,[5] and when a preliminary decision made before 1972 became final after that date.[6] But a series of allegedly discriminatory actions against the same employee, even with the same alleged motive such as sex discrimination, is not enough. *See Milton v. Weinberger*, 645 F.2d 1070, 1072 n.3, 1077 (D.C. Cir. 1981) (no "continuing violation" when female plaintiffs unsuccessfully applied on six occasions between 1972 and 1977 for position as GS-14 Equal Employment Opportunity Officer); *Klapac v. McCormick*, 640 F.2d 1361, 1366 (D.C. Cir. 1981) (even though complaint also alleged a post-1972 violation, Title VII did not cover refusal to admit plaintiff to training programs between 1964 and 1966, denial of on-the-job supervisory training from 1966 to 1971, and rejection for promotion in 1971).

In the words of the court in *Milton v. Weinberger*, *supra*, 645 F.2d at 1076, appellant has not adequately alleged that the pre- and post-1972 acts by the government "constituted continuing discrimination, pervasive bias, or unlawful employment policies, thus entitling

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[4] *See Thompson v. Sawyer*, —— F.2d ——, ——-——, —— (D.C. Cir. No. 80-2098, decided April 27, 1982) (slip op. at 44-50, 58) (job classifications, restrictions on training); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978) (unequal pay, inferior accommodations, and other inequalities in benefits and requirements).

[5] *Shehadeh v. Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 719, 725 (D.C. Cir. 1978) (plaintiff alleged a "long-lasting pattern of like events," possibly as many as 200 discriminatory reports by the same group of personnel).

[6] *Bethel v. Jefferson*, 589 F.2d 631, 636 (D.C. Cir. 1978) ("not an assortment of unrelated happenings, but a chain of connected events").

[him] to relief from the time limits in the Code of Federal Regulations. * * * [T]he appellan[t] seek[s] relief not from an unlawful program of discrimination, but from specific, perhaps unrelated instances of it." For this reason the pre-1972 claims are beyond the coverage of Title VII; we affirm the District Court's grant of summary judgment.

B. *The 1972 Career Screening Panel*

In 1972 the Career Screening Panel reviewed Stoller's record, placed him in the promotable category for positions in his field of specialty, but failed to recommend him for promotion. Stoller alleges that the panel thereby restricted his promotional opportunities and discriminated against him on the basis of religion and national origin. In deposition he conceded that he had no evidence that the 1972 Career Screening Panel members were consciously motivated by religious discrimination; indeed, he had no evidence that the panel members knew that he was Jewish. JA 59-60.[7] Nevertheless he argued that Title VII had been violated because the panel's decision was based on false and discriminatory evaluations previously prepared by his supervisors and placed in his file.

The District Court granted summary judgment on this claim in favor of the government. It reasoned that Stoller was not complaining of a "present" violation by the 1972 panel; "rather, he complains that a neutral 1972 CSP [Career Screening Panel] would not have failed to promote him but for employment problems resulting from illegal religious or national origin discrimination which occurred in Vietnam in 1968 and 1969." JA 15. Relying on the Supreme Court's decision in *United Air Lines v. Evans, supra*, 431 U.S. at 558, the court concluded that

[7] *See* Stoller Deposition at 118-119, 177-178; Plaintiff's Supplemental Answers to Defendant's First Set of Requests for Admissions #129, #134.

the "present effects of past discrimination" did not constitute a violation of Title VII.

In our view the District Court erred in its characterization of Stoller's argument. Stoller's claim was not based on the "present effects of past discrimination" within the meaning of *Evans*. Rather, he claimed that the 1972 screening panel violated Title VII by relying on false evaluations prepared and placed in his file by supervisors discriminating against him on grounds of his religion and national origin. Title VII is violated when an employing organization uses discriminatory evaluations of an employee which were prepared by its own supervisory personnel, unless its procedures have given the employee a reasonable opportunity to inspect and correct these evaluations. Therefore the government was not entitled to judgment as a matter of law; we reverse summary judgment on Stoller's fourth claim and remand to the District Court for further proceedings.[8]

1. *Decisions based on discriminatory evaluations*

The broad language of Title VII is designed to "implement the pervasive congressional objective of 'equality of employment opportunities.'" *Shehadeh v. Chesapeake & Potomac Tel. Co.*, *supra*, 595 F.2d at 721. An employer

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[8] The government moved to dismiss Stoller's fourth contention for failure to state a claim, or in the alternative for summary judgment. It contended that Title VII would be violated only if the ultimate decisionmakers acted with "discriminatory animus." Government's Reply Memorandum in Support of Motion to Dismiss at 8. The parties agreed that the 1972 panel did not deliberately discriminate against Stoller.

In accordance with Rule 12(b) the court treated the motion as one for summary judgment, because it considered matters outside the pleadings including Stoller's admissions and deposition. Because we hold that the grounds for dismissal asserted by the government were insufficient, we must reverse the District Court's grant of summary judgment.

may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1976). This case requires us to interpret this statutory command in the context of institutional decisionmaking.

Stoller's claim arises out of a bifurcated decisionmaking process. His supervisors in Vietnam prepared evaluations for his personnel file which, according to Stoller, were falsified for discriminatory reasons. The Career Screening Panel assertedly relied on these unfavorable evaluations without knowing of the supervisors' discriminatory animus. The government contends that the resulting decision not to promote Stoller was lawful—even if the evaluations were both false and discriminatory—because the screening panel's members did not intend to discriminate against him. In effect it asserts that the motives of the supervisors were irrelevant because of the division of labor between the supervisors and the screening panel, even though both acted in their official capacities within the same government department. This issue was expressly left unresolved by the court in *Shehadeh v. Chesapeake & Potomac Tel. Co.*, *supra*, 595 F.2d at 720 n.43:

> The extent to which an employer may rely upon the discriminatorily-contrived personnel records of an employee no longer working for the employer, or one still engaged and presumably able to correct the falsified file, is a substantial question that we need not now address. * * *

Stoller's fourth claim squarely raises the issue for decision.

The government's restrictive view of Title VII is inconsistent with the broad remedial policies of the statute in an age of bureaucratic decisions. Under Title VII no "employer" may discriminate against an employee

"because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1976). If the "employer" is an organization, a finding of discrimination or nondiscrimination depends on motives, actions, and procedures in all parts of the organization which played a causative role in the challenged employment decision.[9]

When a supervisor, acting in his official capacity, deliberately places an inaccurate, discriminatory evaluation into an employee's file, he intends to cause harm to the employee. As this court has recognized in another context, "An unfavorable employee assessment, placed in a personnel file to be reviewed in connection with future decisions concerning pay and promotion, could both prejudice the employee's superiors and materially diminish his chances for advancement." *Smith v. Secretary of the Navy*, 659 F.2d 1113, 1120 (D.C. Cir. 1981); *see President v. Vance*, 627 F.2d 353, 361 (D.C. Cir. 1980) (in determining scope of administrative complaint, "it is impossible to conceive of an inferior performance evaluation as other than a detriment to promotion"). If these reasonably anticipated consequences actually occur before the employee has had a fair chance to examine and correct the file, the employer—that is, the organization as a whole—cannot escape Title VII liability simply because the final decisionmaker was not personally motivated by discrimination. *See Mangiapane v. Adams*, 661 F.2d 1388, 1390 n.14 (D.C. Cir. 1981) (even though a claim based on discriminatory performance evaluations was not before the court, evidence of evaluations may

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[9] As this section explains, the motives underlying supervisory evaluations must be considered in determining whether a subsequent employment decision is discriminatory. If the employer provides procedures for employees to inspect and correct their supervisory evaluations, however, the employees' rights are sufficiently protected and the employer may subsequently rely in good faith on the evaluations without Title VII liability. *See* Part II-B-3 *infra*.

be admissible "as an indication of motivation behind the asserted denials of promotion").

In *Stephenson v. Simon*, 427 F.Supp. 467, 472-473 (D. D.C. 1976), the District Court found that plaintiff's rights had been violated when another of the four "best qualified" candidates was selected for promotion. A discriminatorily low evaluation by her supervisor, which greatly reduced her overall point rating, had severely prejudiced her opportunity for promotion. The court did not determine whether the selecting officer was biased, or whether he knew that the supervisory rating was discriminatorily motivated. It was enough that the applicants' point totals were "substantially, if not entirely, determinative" in the selection. Similarly, in *Copeland v. Secretary of Labor*, 414 F.Supp. 647, 652 (D. D.C. 1976), there was a clear indication that plaintiff's supervisor would have selected her for a particular promotion if she had been certified as eligible. The court found that she failed certification because of "unfair and incomplete evaluations that, in substantial part, reflected * * * sex bias * * *." Therefore it held that plaintiff was entitled to relief under Title VII. *Cf. MacRae v. McCormick*, 458 F.Supp. 970, 974-975 (D. D.C. 1978) (opinion assumes that failure to promote based on a discriminatory evaluation by plaintiff's supervisor would violate Title VII, but finds no discrimination by supervisor); *Rakestraw v. U.S. Penitentiary*, 24 FEP 1316, 1319-1322 (N.D. Ga. 1980) (government conceded that performance evaluation was discriminatory; plaintiff lost because he failed to prove that, in selection processes involving promotion boards and selecting officials, he would have been promoted if the evaluation had been fair).

2. *Inapplicability of* United Air Lines v. Evans

When an employee alleges that he has been denied promotion because of a discriminatory evaluation, the timeliness and cognizability of the administrative com-

plaint are measured by the date the employee learned of the promotion decision. It does not matter when the evaluation was prepared—before or during the filing period, before or after the effective date of Title VII. The discriminatory action of which the employee complains is the failure to promote, *see* Part II-B-1 *supra*; the supervisor's alleged discriminatory animus is background information which might make the decision discriminatory.

This analysis shows that *United Air Lines v. Evans*, *supra*, relied upon by the District Court, is inapposite. *Evans* held that an employer did not violate Title VII by giving seniority credit only for continuous service, even if the employee's career was interrupted in the past by a discriminatory policy for which the employee did not seek timely relief. A stewardess had been discharged because the airline had a policy of terminating stewardesses when they married. In subsequent litigation brought by other plaintiffs, the policy was declared illegal under Title VII. The plaintiff was rehired, but the airline refused to give her seniority credit for any period before the date she was rehired. The Supreme Court rejected her claim that the airline was presently violating Title VII. In its view the seniority system operated neutrally, even though it gave present effect to a past act of discrimination. Under the circumstances the airline's previous discharge of the plaintiff was

> the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558.

Evans stands for the proposition that, in a neutral decisionmaking process, an employer may lawfully take

account of objective facts in an individual's past employment record. These facts—such as the number of years of continuous service, *see Evans, supra*; specialized training, *see Klapac v. McCormick, supra*, 640 F.2d at 1366; or necessary job-related experience, *see Myles v. Schlesinger*, 436 F.Supp. 8, 15 (E.D. Pa. 1977)—cannot be erased or modified immediately, even if they resulted from prior unchallenged acts of discrimination. In some employment decisions they may play a legitimate role. Lack of training may disqualify an employee for a higher position; discontinuities in service may affect the quality or nature of an employee's work. *See* Case Comment, *Past Discrimination and Present Violations of Title VII*: Farris v. Board of Education, 92 HARV. L. REV. 757, 766 (1979).

But Stoller's fourth claim differs materially from the contention rejected in *Evans*. He alleges that the 1972 screening panel's decision was based not on objective facts in his past employment history, but on subjective and allegedly false supervisory evaluations. If these evaluations were indeed false and discriminatory, then Stoller was denied a fair chance to be evaluated on his own merits by the 1972 Career Screening Panel. The alleged discriminatory animus of his supervisors in Vietnam is "relevant background evidence" in a proceeding challenging the lawfulness of the 1972 decision. *See* 431 U.S. at 558.

As the District Court wrote in *Myles v. Schlesinger, supra*, 436 F.Supp. at 15 n.7, *Evans* should be distinguished from

> the case where a plaintiff charges that s/he was denied a promotion because an old discriminatory evaluation was used in the current employment decision. The new direct use of the evaluation gives it fresh significance and should be treated as a new and independent act of discrimination. * * * [A] new use of an old biased evaluation would not be

> racially neutral. The evaluation would not be an objective, nondiscriminatory criterion as would be length of service or lack of job experience.

The District Court implicitly accepted this analysis of the *Evans* principle in *MacRae v. McCormick*, *supra*, 458 F.Supp. at 974-975. When MacRae applied for a promotion in September 1973, his supervisor submitted an evaluation. Although MacRae was not selected for the job, he did not file a charge of discrimination. In April 1974 he applied for another job opening. The promotion panel used the evaluation prepared by his supervisor in September 1973; again MacRae did not receive the promotion. This time he filed a timely administrative complaint. The court noted that the first denial of a promotion was not before the court, but added that the September 1973 evaluation—time-barred in its own right—"may be probative of the claim now before the Court" as background evidence, citing *Evans*. *Id.* at 974 n.1. Similarly, in Stoller's case the allegedly discriminatory evaluations are relevant to his claim based on the 1972 Career Screening Panel's decision, even though they were prepared in 1968, before the passage of the 1972 amendments and outside of the 30-day filing period.[10]

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[10] In *Delaware State College v. Ricks*, 449 U.S. 250, 258-259 (1980), the Supreme Court stressed that " 'the proper focus [in determining timeliness of filing] is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.' " *Quoting Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) (emphasis added by the *Ricks* Court). In *Ricks* a college professor was denied tenure but received a one-year terminal contract; the Court held that the filing limitations period commenced when the tenure decision was made, even though plaintiff did not lose his teaching position until later. In this case, in contrast, although preparation of the evaluation may have been a discriminatory act, the 1972 screening panel's decision is alleged to have been an unlawful discriminatory act in its own right. *See* Part II-B-1 *supra*.

3. *Prior opportunity to inspect and correct the file*

Thus, even if a period of time separates an allegedly discriminatory evaluation and the resulting unfavorable employment decision, the motive behind the evaluation may be considered in a challenge to the subsequent decision. Otherwise an organization could separate illegal motive from decisionmaking responsibility, contrary to the principle that Title VII applies to the employer as an *organization*. *See* Part II-B-1 *supra*. But this principle has a corollary: after preparation of employee evaluations, the employing organization may protect itself from Title VII liability by establishing procedures to allow employees to screen their personnel files and to remove damaging, discriminatory information. The ultimate decisionmaker cannot personally investigate every factual assertion in an applicant's file. Inevitably he or she must rely on the assertions and judgments of others within the organization. If established procedures have given an employee a reasonable opportunity to inspect the supervisory evaluations in his or her file, to challenge allegedly inaccurate materials, and to have such materials corrected or removed,[11] and if the organization gives its employees adequate notice that these rights may be exercised,[12] then it may rely in good faith on such evaluations in making subsequent employment decisions without violating Title VII.

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[11] These procedures need not form part of an equal employment opportunity program; general procedures for disclosure of employee appraisals, coupled with grievance procedures for correcting inaccurate files, might be sufficient. As long as an employee has the chance to examine and correct his supervisory evaluations, he may be expected to challenge those he believes to be discriminatory.

[12] The government has the burden of producing evidence on this question, because it has much greater access to information about its personnel procedures, but the plaintiff retains the ultimate burden of persuasion.

For federal government employees, the procedures mandated by the Privacy Act—which became effective on September 27, 1975—satisfy these criteria.[13] Under the Act and accompanying regulations, an employee has a right of access to his personnel records. 5 U.S.C. § 552a (d)(1) (1976); 5 C.F.R. § 297.203(a) (1982).[14] Upon the employee's request, the agency must either make any correction of any portion of the record which he believes is "not accurate, relevant, timely, or complete," or give reasons for its refusal. 5 U.S.C. § 552a(d)(2) (1976); *see* C.F.R. §§ 297.306(d), 297.307 (1982). The agency must provide procedures for administrative review of its refusal within 30 days, 5 U.S.C. § 552a(d)(3) (1976); 5 C.F.R. § 297.308 (1982), and a final adverse agency determination is judicially reviewable. 5 U.S.C. § 552a (g)(1)(A) (1976). In addition, the regulations provide that agencies, at least annually, must announce by a notice that reaches all employees that the Privacy Act gives them the right of access to their personnel records. 5 C.F.R. § 297.409 (1982).

Stoller's fourth claim, however, is based on a decision by the federal government in 1972, before the effective date of the Privacy Act. On the present record we are unable to determine whether the Department of the

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[13] If such procedures have not been established by an agency or are being systematically flouted, however, the agency may not rely on the Privacy Act to insulate itself from Title VII liability for using supervisory evaluations in employment decisions.

[14] In addition, recently enacted legislation requires each agency to establish performance appraisal systems in accordance with Office of Personnel Management regulations. 5 U.S.C. § 4302(b) (Supp. IV 1980). OPM requires that periodic appraisals shall be in writing and shall be provided to the employee; they shall be used to "provide employees with information on their performance and how it may be improved." 5 C.F.R. § 430.203(g), (l)(1) (1982); *see* Federal Personnel Manual § 430 at 430-3, 430-A-1 to 430-A-3, 430-A-10 (1980).

Army's procedures between 1968 and 1972 in fact gave Stoller an adequate opportunity to inspect and correct his supervisory evaluations. Stoller stated in deposition that in June 1969 an Army personnel officer told him that "I didn't get along with Vietnamese, according to the reports from Vietnam." Stoller deposition at 113-115.[15] Civil Service Commission regulations in effect in 1969, applicable to the Department of the Army, gave employees a right to inspect their official personnel folders, 5 C.F.R. § 294.703(a) (1970); Federal Personnel Manual § 294 at 294-17 to 294-18 (1969); *see* 32 C.F.R. § 518.3(g)(9) (1970) (Department of Army regulations referring to Federal Personnel Manual disclosure requirements). The contents of these folders included unsatisfactory performance ratings and other disciplinary documents. Federal Personnel Manual Supplement 293-31 at 293-A-3, 293-A-4 (revised July 1969). It is not clear, however, whether the Department of the Army's grievance procedures permitted employees to challenge and correct supervisory evaluations. *See* Federal Personnel Manual § 771 at 771-3 to 771-12 (revised July 1969) (general guidelines for agency grievance procedures). It also does not appear whether the Army gave employees adequate notice of their rights under existing regulations.

Stoller asserts that, although he asked to examine the supervisory reports from Vietnam, his request was denied, Opposition to Motion to Dismiss at 3, in violation of Civil Service Commission and Department of the Army regulations, Plaintiff's First Set of Requests for Admissions #25. The government, on the other hand, denies this allegation. Defendant's Answers to Plaintiff's

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[15] Stoller's memorandum in opposition to the government's motion to dismiss stated that, when he applied unsuccessfully for overseas employment in 1969, he "was made aware, by defendant's employees, that there was something in writing to the effect that plaintiff was unable to get along with foreign nationals." Opposition to Motion to Dismiss at 3.

First Set of Requests for Admissions #25, #35.[16] This disputed issue of fact may be considered by the District Court on remand. If the court finds that Stoller's request to examine his evaluations was denied, it should further determine whether Stoller had a right to appeal the denial and whether he received adequate notice of any such opportunity.

In summary, a number of unresolved issues of material fact await the District Court on remand. To show that the 1972 decision was in fact discriminatory, Stoller must prove that his supervisors in Vietnam prepared materially false or inaccurate evaluations, that they were motivated by illegal discriminatory reasons, and that these evaluations caused the Career Screening Panel's decision not to promote him in 1972. The government may come forward with evidence that under established procedures Stoller actually had the opportunity, before the 1972 panel deliberations, to inspect the allegedly discriminatory evaluations and to correct or remove them. Stoller bears the ultimate burden of proof.

C. *Denial of Motion to Reconsider*

Finally, Stoller contends that the District Court erroneously denied his Rule 60(b) motion to reconsider the summary judgment ruling and to grant leave to amend his complaint to allege a new discrimination claim. After submission of the case to the District Court on motion in April 1980, in another suit the District Court held that "pervasive systemic defects" in the Army's promotion procedures had resulted in unlawful discrimina-

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[16] Stoller also alleges that the unfavorable information was included in a "secret" or unauthorized file. *See* Plaintiff's Answers to Defendant's First Set of Interrogatories #21 at 3. Defendant denies that any unauthorized file existed; it contends that the Department of the Army files maintained in 1969 concerning plaintiff were those kept on all career employees. Defendant's Answers to Plaintiff's First Set of Interrogatories #1 at 1.

tion against employees of the Office of Employment Policy and Grievance Review (OEPGR), who were responsible for enforcing Title VII. *Clark v. Alexander*, 489 F.Supp. 1236 (D. D.C. 1980), *aff'd in part and remanded in part on other grounds*, 665 F.2d 1168 (D.C. Cir. 1981). Stoller, an OEPGR employee during the period covered by *Clark*, sought to amend his complaint to include an allegation that the Army had discriminated against him as a member of the OEPGR staff. He had not previously pursued administrative remedies for this claim.

The District Court properly denied Stoller's motion. The findings in *Clark* regarding discrimination against OEPGR staff are not relevant to the issues of religious and national origin discrimination before the court in this case. A Rule 60(b) motion for reconsideration is not a vehicle for introducing entirely new claims into an action. In addition, Stoller has not demonstrated that evidence of discrimination against him because of his OEPGR status was unavailable to him before the entry of judgment by the District Court.

III

For the reasons stated, we affirm the District Court's grant of summary judgment for the government on Stoller's three claims arising out of pre-1972 personnel decisions, and its denial of Stoller's post-judgment motion for reconsideration. We reverse summary judgment with respect to Stoller's fourth claim—the denial of promotion in 1972—and remand for further proceedings in accordance with this opinion.

So ordered.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1032

[Filed: May 22, 1981]

Jack C. Stoller,
Plaintiff,

v.

John O. Marsh, Jr.,
Defendant.

ORDER

UPON CONSIDERATION of plaintiff's motion for reconsideration, the memoranda in support and in opposition thereto, and the entire record in this case, it is by the Court this 22nd day of May, 1981,

ORDERED that plaintiff's motion for reconsideration be, and the same hereby is, denied.*

[Signature]
United States District Judge

* Plaintiff relies on the decision in *Clark v. Alexander*, 489 F. Supp. 1236 (D DC 1980), to support his request for reconsideration. The Court has reviewed that case and concludes that it is distinguishable. First, it involved an attack on a system serving to perpetuate past discrimination. Second, Clark presented evidence

[footnote continued]

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that she had been denied promotions to positions for which she was qualified and evidence that she had been persistently discriminated against by the defendants on account of gender and her EEO activities. *Id.* at 1247. Here, the plaintiff was thoroughly examined at his deposition over a period of two days but failed to present any concrete evidence of discrimination. *See e.g.*, Memorandum at Part II. Plaintiff now seeks to change his entire claim but has pressented no evidence or proffer to support his contentions of discrimination. The Court concludes that his motion for reconsideration must be denied, and that there is no need for an oral argument. *See* Local Rule 1-9(f).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1032

Jack C. Stoller,
Plaintiff,

v.

John O. Marsh, Jr.,
Secretary of the Army,
Defendant.

MOTION FOR RECONSIDERATION

Pursuant to Rule 60(b), F.R.C.P., Plaintiff hereby moves this Court for reconsideration of its Order of April 30, 1981, granting Defendant's Motion for Summary Judgment and dismissing this case with prejudice, in light of the information presented in the Memorandum filed herewith.

It is requested that the Court permit oral argument on this Motion.

Respectfully submitted,

/s/ Roy Tesler

Jack C. Stoller,
By Counsel

Roy Tesler, #128512
PARKER & TESLER

113 Rowell Court
Falls Church, VA 22046
(703) 534-9300

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion for Reconsideration and accompanying Memorandum, was made upon Defendant by hand-delivering copies thereof to Scott T. Kragie, Assistant U.S. Attorney, United States Courthouse, Room 3718, 3rd and Constitution Avenue, N.W., Washington, D.C. this 8th day of May, 1981.

/s/ Roy Tesler

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1032

Jack C. Stoller,
Plaintiff,

v.

John O. Marsh, Jr.,
Secretary of the Army,
Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

Rule 60(b), F.R.C.P., provides that on motion and upon such terms as are just, the Court may relieve a party from a final order when there is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), F.R.C.P.

Defendant filed its motion to dismisss, or in the alternative, for summary judgment, in this proceeding, on or about March 5, 1980. A Supplement to Defendant's motion was served on plaintiff on March 13, 1980. Plaintiff's Opposition was filed on April 11, 1980. On April 18, 1980, one week after the instant case was submitted to this Court on motion and opposition thereto, Judge Aubrey E. Robinson, Jr., handed down this Court's decision in *Clark v. Alexander,* 489 F. Supp. 1236, Civ. Act. No. 77-1001.

In that case, a retired Department of the Army employee brought a Title VII action alleging, *inter alia*, that she was deprived of equal opportunity for training, development, lateral reassignment and promotion under the Department of the Army Career Program for Civilian Personnel Administration because of gender.

This Court held that the Army's Office of Employment Policy and Grievance Review employees were victims of prohibited discriminatory employment practices.

> Moreover, the statistics and trial testimony indicate beyond doubt that the DA refused and continues to refuse to promote qualified women to high level policy making positions. The system, by providing the personnel boards with unfettered discretion, had and has a disparate impact upon classes of people protected by Title VII, *viz.* women and OEPGR employees. Not only did Plaintiff establish a *prima facie* case of discrimination, *McDonnell Douglas Co. v. Green, supra*, but she easily met her ultimate burden of proof. *Furnco Construction Co. v. Waters, supra.* The pervasive systemic defects inherent in the Career Program operated and continue to operate to discriminate against women, who have suffered from prior discriminatory employment practices, and OEPGR staff who enforce the EEOA. Although the system is facially neutral, disparate impact runs rampant in the DA Career Program. *Griggs v. Duke Power Co., supra*; *Teamsters v. U.S., supra.*

(489 F. Supp. 1236, 1246).

Jack C. Stoller, the plaintiff herein, was an OEPGR employee enforcing EEOA from November 1970 to August 1978, within which time frame the Army's discriminatory practices were operating upon OEPGR employees. Plaintiff's fourth claim of discrimination is

based upon the failure of the 1972 Career Screening Panel to promote him (Memorandum of the Court, p. 5).

As plaintiff was unaware of his status as a member of a class against which the Army's Career Program was operating discriminatorily (i.e., OEPGR staff who enforced the Equal Employment Opportunity Act), as this Court so found in the *Clark* case, he could not allege this in his Complaint in this case.

Accordingly, it is urged that the Court reconsider its ruling that defendant is entitled to summary judgment with respect to plaintiff's fourth claim of discrimination, and grant plaintiff leave to amend his complaint in this case.

Respectfully submitted,

/s/ Roy Tesler

Jack C. Stoller,
By Counsel

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(703) 534-9300
Counsel for Plaintiff

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 78-1032

[Filed: April 30, 1981]

Jack C. Stoller,
Plaintiff

v.

John O. Marsh, Jr.,
Secretary of the Army,
Defendants

ORDER

This comes before the Court on defendants' Motion to Dismiss, or in the alternative, for Summary Judgment.

For the reasons to be stated in the Memorandum to be filed in this case, the Court concludes that defendants' Motion for Summary Judgment should be granted.

It is hereby

ORDERED that defendants' Motion for Summary Judgment is granted, and it is further

ORDERED that this case is dismissed with prejudice.

/s/ John Garrett Penn
United States District Judge

Dated: April 30, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 78-1032

[Filed: May 6, 1981]

Jack C. Stollar,
Plaintiff

v.

John O. Marsh, Jr.,
Secretary of the Army,
Defendant

MEMORANDUM

The plaintiff, in this action filed pursuant to the Equal Employment Opportunity Act of 1973 (Act), 42 U.S.C. § 2000e-16, alleges that he was the victim of religious and national origin employment discrimination relating to four separate incidents between 1968 and 1972. The defendant is John O. Marsh, Jr., Secretary of the Army.[1] The case is now before the Court on defendant's motion to dismiss, or in the alternative, for summary judgment.

I.

Briefly, the facts are as follows: Beginning in 1967, the plaintiff was employed as a Civilian Personnel Management Specialist, GS-11, in Saigon, Vietnam. He served in that position for one year and, although he desired

[1] Substituted pursuant to Fed. R. Civ. P. 25(d).

to remain in Vietnam beyond that period,[2] the Civilian Personnel Director denied his request and transferred him in April 1968 to a working position in the domestic United States at no reduction in grade. Plaintiff did not allege discrimination following that assignment. Eight months later, the plaintiff applied for and was denied overseas employment. He did not complain of discrimination at that time. In May 1972, the plaintiff was informed that the 1971 Career Screening Panel (CSP) had placed him in a deferred category. In May 1973, he learned that the 1972 CSP had placed him in the promotable category for positions in his field of speciality but had not promoted him. On June 14, 1973, following an attempt at informal resolution with an Equal Employment Opportunity Counselor, plaintiff filed a formal administrative complaint alleging religious (Jewish) and national origin (Semite) discrimination.

Plaintiff bases his complaint on the fact that the 1972 CSP failed to promote him because of his past employment history. After completing the investigatory process the Civil Service Commission held against the plaintiff, finding no discrimination, and that decision was affirmed by the Appeals Review Board in May 1978. This action was filed within 30 days thereafter.

Plaintiff alleges that the Department of the Army discriminated against him by (1) his reassignment from Vietnam in 1968, (2) the denial of plaintiff's application for overseas employment in 1969, (3) the 1971 CSP decision to place him in a deferred category, and (4) the 1972 CSP decision to place him in a promotable category in the field of his speciality.

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[2] Plaintiff testified at his deposition that he was entitled to a five year tour of duty in Vietnam. Dep. at 172.

The defendant, in his motion to dismiss, or in the alternative, for summary judgment,[3] contends that plaintiff has failed to exhaust his administrative remedy with respect to the 1971 CSP decision in that he waited a full year before filing his claim and that, with respect to the two prior claims, plaintiff has never pursued an administrative remedy. Defendant also contends that the Act does not confer jurisdiction on the Court for claims arising before March 24, 1972. Finally, the defendant argues that the plaintiff does not have a claim with respect to the actions of the 1972 CSP because he does not complain that the decision of the CSP actively or intentionally discriminated against him; rather, he argues that the 1972 CSP determination was tainted by the earlier, discriminatory actions against him in 1967 through 1971.

II.

Before discussing the merits of the pending motion, it is important to briefly make note of some of the underlying facts in this case.

Plaintiff contends that he was the victim of discrimination during the period he was in Vietnam, from March

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[3] The plaintiff argues that the Court should deny the motion for summary judgment because the defendant has failed to file a statement of material facts as to which the moving party contends there is no issue. Local Rule 1-9(h). Defendant argues that since his primary motion is one to dismiss, and is based upon plaintiff's failure to timely file his claim of discrimination, that the Rule 1-9(h) statement is not required.

In any case in which a motion for summary judgment is filed, whether it is the sole motion or in the alternative, it should be accompanied by the Rule 1-9(h) statement, and where the statement is filed and unanswered by the opposing party, the facts set forth therein are deemed admitted.

1967 to April 1968. He states that "[a]t no time while I was in Vietnam did my colleagues use any epithets of a religious nature against me, at least within my hearing". Stollar Affidavit. He goes on to state that "in thinking back to Vietnam, I realized that the discrimination which I had only smelled was more serious than I had thought and was indeed continuing to adversely affect my career opportunities with the Army". *Id.* Plaintiff argues in his affidavit that the fact that he was unaware of the anti-Jewish remarks or actions of his colleagues until 1972 and the fact that the decision of the 1972 CSP was based, in part, on his total record, including his service in Vietnam, resulted in continuing discrimination against him by the Army.

The plaintiff's deposition was taken over a period of two days approximately one month before the affidavit was filed. Plaintiff complained in the deposition that he was never greeted at the airport, that he was made to stay in quarters deemed inadequate by the Army, that co-workers made embarrassing and derogatory comments about Jewish dietary laws, that he was denied information concerning membership in the International Club in Vietnam, that he was harassed by co-workers who piled furniture against his desk and chair, and that some co-workers who would creep up on him and yell in his ears. *See* Plaintiff Opposition at 2.

However, when one reviews the deposition, the above allegations appear to take on a different hue. For example, plaintiff testified that he did not believe that they failed to meet him at the airport because he was Jewish, Dep. at 130, and he further notes that he missed his flight causing him to land at a different airport, and that indeed there were other occasions when other people were not met at the airport, *id.* at 180-181. He testified

that he was not really complaining about his stay at the temporary quarters, Dep. at 129, and that the fact that he stayed there was not the result of religious discrimination, *id.* at 129-130. He makes basically the same contention with respect to the chair piling incident. Dep. at 130-132. The alleged derogatory remarks concerning the dietary habits of members of the Jewish faith, consisted of a co-worker telling a waitress to take away the breakfast she served plaintiff because it contained pork, and another incident where a co-worker asked plaintiff whether he was allowed to eat pork. Dep. at 57-58.

In all, the plaintiff testified to the above and perhaps three or four other incidents which occurred. At no time in his deposition did the plaintiff point to any specific conduct to support his argument that he was the victim of discrimination. He testified that he was in personnel, that at the time of the incident he felt he was being mistreated, and that he was aware of procedures for making a complaint. Dep. at 24-25.

III.

The Act provides the exclusive judicial remedy for claims of religious or national origin discrimination in connection with federal employment. *Brown v. GSA*, 425 U.S. 820 (1972). It is also quite clear that, before filing a civil action pursuant to the Act, the aggrieved employee must exhaust his administrative remedies. *Id.* at 832. *See also* 42 U.S.C. § 2000e-16(c), 29 CFR § 1613.214.

The plaintiff makes four claims allegedly arising out of discrimination against him due to his religion and/or national origin. The first two relate to the 1968 reassignment and the 1969 transfer action. However, plaintiff

never filed an administrative complaint and this being the case, he has failed to exhaust his administrative remedies.

His third claim of discrimination is based upon the 1971 CSP decision. However, plaintiff filed a claim in that matter, in May 1973, a year after he learned of the decision and his complaint as to that claim is also untimely. Additionally, with respect to claims based upon alleged discrimination prior to the effective date of the Act, March 24, 1972, the Court lacks jurisdiction unless those claims were pending on that date. *Brown v. Turner,* 490 F. Supp. 939, 940 (D DC 1980); *Stephenson v. Simon,* 427 F. Supp. 467, 471-72 (D DC 1976).

Finally, as to the above claims, the record demonstrates that the plaintiff was aware of the alleged discriminatory acts and could have filed timely claims. Thus, any argument that the time to file was tolled is also without merit.

Defendant is entitled to summary judgment for the claims submitted for 1968, 1969 and 1971.

IV.

Plaintiff's fourth claim is based upon the failure of the 1972 CSP to promote him and not upon any unlawful intentional discrimination by that panel. Dep. at 118-119. He contends that the 1972 CSP failed to promote him because of his past employment history. In essence, plaintiff complains that he was not promoted by the 1972 CSP because of what happened in 1968 and 1969.

The facts in this case are similar to those in *United Air Lines v. Evans,* 431 U.S. 553 (1977), where the female plaintiff had been employed by the airline as a flight attendant from 1966 to 1968. The airline had a policy of refusing to permit female flight attendants to marry

and when the plaintiff married in 1968, she was forced to resign. It was later held, in an unrelated case, that the policy violated Title VII. The plaintiff was not a party to that action, however. She was rehired by the airline as a flight attendant but without seniority. She complained that, although the seniority system itself was neutral, she was the victim of discrimination in that she was being penalized because she had been improperly forced to resign after she married and that the neutral seniority system gave present effect to the past illegal act and perpetuated the consequences of forbidden discrimination. *Id.* at 557.

The Supreme Court rejected that argument and held that the airline was not committing a present, continuing violation of Title VII. The court noted that the "critical question is whether any present *violation* exists". *Id.* at 558.

The plaintiff here does not complain of a *present* violation by the 1972 CSP; rather, he complains that a neutral 1972 CSP would not have failed to promote him but for employment problems resulting from illegal religious or national origin discrimination which occurred in Vietnam in 1968 and 1969. The remarks of the Supreme Court in *United Air Lines*, however, have equal applicability in this case:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a pro-

> ceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

431 U.S. at 558.

Since the plaintiff does not contend that there is a present violation, it follows under the holding of *United Air Lines v. Evans, supra,* that he cannot prevail in this action.

In view of the above, the Court concludes that the defendant is entitled to summary judgment with respect to the fourth claim of discrimination.

An appropriate order granting summary judgment and dismissing the case with prejudice will be entered.

/s/ John Garrett Penn
United States District Judge

Dated: May 5, 1981

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-893

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK C. STOLLER, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks to bring Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, three employment discrimination claims under that relate to events occurring before Title VII became applicable to the federal government.

1. a. Beginning in March 1967, petitioner was a civilian employee of the Department of the Army in Saigon. After his first year in Vietnam, he was transferred to the United States although he wished to remain in Vietnam. In 1969, petitioner sought, but was denied, overseas employment with the Department of the Army. In May 1972, petitioner was informed that in 1971 the Career Screening Panel had placed him in a "deferred" category on the ground that he was ineligible for promotion. Although an administrative procedure for challenging these actions as discriminatory was available to petitioner, he did not file any administrative charge. Pet. App. 3a-4a & n.1, 31a-32a.

Later in 1972, the Career Screening Panel placed petitioner in a promotable category but did not recommend him for promotion. Petitioner was notified of this action and filed an administrative complaint, claiming that he had been discriminated against because he is Jewish. After a lengthy investigation, the Civil Service Commission found that the Army had not discriminated against petitioner, and that decision was affirmed by the Appeals Review Board. Pet. App. 4a-5a, 32a.

Petitioner then brought this Title VII action in the United States District Court for the District of Columbia. Petitioner alleged that the Department of the Army violated 42 U.S.C. 2000e-16(a) because it " 'has discriminated and is continuing to discriminate against [petitioner] in each of the following ways': (1) the 1968 refusal to allow him to 'complete his normal tour in Vietnam'; (2) the denial of his application in 1969 for another overseas assignment; (3) the 1971 panel's decision that he was ineligible for promotion; and (4) the 1972 panel's restriction of his promotional opportunities."

The district court granted summary judgment against petitioner on all four claims. The district court reviewed petitioner's deposition and noted that "[a]t no time in his deposition did [petitioner] point to any specific conduct to support his argument that he was the victim of discrimination" (Pet. App. 35a). But the district court dismissed the first three claims for two other reasons. First, the court ruled that petitioner had failed to file a timely complaint challenging these three actions, even though "the record demonstrates that [petitioner] was aware of the alleged discriminatory acts and could have filed timely claims" (*id.* at 36a) and petitioner testified, in his deposition, that "he was aware of procedures for making a complaint" (*id.* at 35a). Second, the court ruled that because petitioner's first three claims pertained to events that occurred before March

24, 1972 — the date Title VII became applicable to the federal government — the district court "lack[ed] jurisdiction" (*id.* at 36a).

The district court also dismissed petitioner's fourth claim, ruling that petitioner had not alleged a discriminatory act by the Career Screening Panel in 1972. Instead, the court said, petitioner alleged only that discrimination that occurred in 1968 and 1969 was reflected in his record and his file and influenced the Panel's decision. The district court held that such a claim was barred by *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977). Pet. App. 36a-38a.

b. The court of appeals affirmed the district court's grant of summary judgment against petitioner's first three claims but reversed on the fourth claim. The court of appeals stated that a claim alleging discrimination by the federal government before 1972 would not be barred "if a continuing violation began before that date but extended after it" (Pet. App. 7a). The court noted that petitioner sought to invoke the continuing violation doctrine by "contend[ing] that, to cover up the allegedly discriminatory and procedurally irregular decision to reassign him to the United States after one year in Vietnam, his superiors created a 'secret file' which was subsequently used by the Army to deny him an overseas assignment in 1969, promotable status in 1971, and a promotion in 1972" (*id.* at 8a). But the court of appeals ruled (*id.* at 8a-10a, quoting *Milton* v. *Weinberger*, 645 F.2d 1070, 1076 (D.C. Cir. 1981); footnotes omitted):

> [T]hese allegations, even if proven, would not establish a "continuing violation" of Title VII; they do not adequately link four separate episodes of alleged discrimination into a single, continuous policy.
>
> * * * * *
>
> [A] series of allegedly discriminatory actions against the same employee, even with the same alleged motive

> such as * * * discrimination, is not enough. * * * [Petitioner] has not adequately alleged that the pre-and post-1972 acts by the government "constituted continuing discrimination, pervasive bias, or unlawful employment policies, thus entitling [him] to relief from the time limits [of Title VII. Petitioner] * * * seek[s] relief not from an unlawful program of discrimination, but from specific, perhaps unrelated instances of it."

With respect to petitioner's fourth claim, however, the court of appeals ruled that "Title VII is violated when an employing organization uses discriminatory evaluations of an employee which were prepared by its own supervisory personnel, unless its procedures have given the employee a reasonable opportunity to inspect and correct these evaluations." Pet. App. 11a. The court of appeals reasoned that "[t]he discriminatory action of which [petitioner] complains is the failure to promote * * *; the * * * alleged discriminatory animus [of those who allegedly placed an unfavorable evaluation in petitioner's file] is background information which might make th[at] decision discriminatory." *Id.* at 15a.

2. a. Despite the court of appeals' specific statement that petitioner's "*allegations*, even if proven, would not establish a 'continuing violation' of Title VII" (Pet. App. 8a; emphasis added), petitioner insists (Pet. 8-9, 10-13) that the court of appeals' affirmance of the grant of summary judgment on the first three claims rests on an improper resolution of disputed factual issues. But petitioner does not identify any respect in which the court of appeals misstated his allegations; indeed, petitioner's statements of his allegations correspond precisely with the court of appeals'. Compare Pet. 15 with Pet. App. 8a. While, as petitioner says (Pet. 10-11), there were of course disputed issues of fact in the case — the government by no means concedes that petitioner's factual allegations are correct — petitioner is unable to specify any

way in which the court of appeals did not accept his version of the facts before concluding that he had not alleged a continuing violation in connection with his first three claims.

b. Petitioner also contends (Pet. 13-17) that the court of appeals erred in not concluding that his allegations constituted a "continuing violation" that entitles him to seek relief for alleged discriminatory acts that occurred before 1972. But petitioner has identified only four discrete acts that he alleges were discriminatory; he has not alleged a continuing policy of discrimination directed at him. Plainly a "continuing violation" theory cannot be used to enable a plaintiff to challenge under Title VII acts by the government that occurred before 1972 merely because he also challenges acts that occurred after 1972. See *Milton* v. *Weinberger*, *supra*, 645 F.2d at 1074-1075.

Petitioner asserts that the four instances of alleged discrimination he identifies become a single, continuous violation because of their "programmatic aspect" (Pet. 15, 17); by this petitioner apparently means that each of these actions was taken by a manager working under a particular Army program. But this allegation can be made whenever a claimant with more than one complaint worked in the same governmental unit at the time of each of the alleged violations, and "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination" (*Delaware State College* v. *Ricks*, 449 U.S. 250, 257 (1980)). Petitioner also asserts that each of the decisions was based on a "secret file" compiled for discriminatory reasons and containing unfavorable information about petitioner (Pet. 15, 16). But at most, this constitutes only an allegation of another discriminatory act — the creation of the file — the adverse consequences of which did not occur until some later time. As far as petitioner's first three claims are concerned, both the

creation of the file and its consequences occurred before Title VII became applicable to the federal government.[1]

Petitioner's argument that he has alleged a continuing violation relies on only one case that was not decided by the District of Columbia Circuit. That case, *Chisholm* v. *United States Postal Service*, 665 F.2d 482 (4th Cir. 1981), was a class action alleging discrimination of a thoroughly systematic sort — "in the areas of promotion, details, examinations, discipline, and pay" (*id.* at 487). Such a case, in which discrete discriminatory acts may even be impossible to identify, is plainly far removed from petitioner's complaint. In any event, the remark in *Chisholm* on which petitioner relies (*id.* at 490 n.11) was casual dictum. See also *Lawson* v. *Burlington Industries, Inc.*, 683 F.2d 862 (4th Cir. 1982), cert. denied, No. 82-325 (Oct. 18, 1982); *Griffin* v. *Pacific Maritime Association*, 478 F.2d 1118, 1120 (9th Cir.), cert. denied, 414 U.S. 859 (1973).[2]

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[1] We do not intend to suggest that we agree with the court of appeals that petitioner's fourth claim — which pertained to an act that occurred after 1972 but was apparently, in petitioner's view, based solely on the "secret file" — should have escaped summary judgment. See *Chardon* v. *Fernandez*, 454 U.S. 6 (1981); *Delaware State College* v. *Ricks*, *supra*.

[2] In *Bethel* v. *Jefferson*, 589 F.2d 631 (D.C. Cir. 1978), the court found a continuing violation to exist because the "claim * * * encompasse[d] not an assortment of unrelated happenings but a chain of connected events * * * in which pre-1972 episodes were * * * [the] seminal links [but i]n no instance * * * [was the] discrimination * * * consummated until" after 1972. As far as petitioner's first three claims are concerned, the alleged discrimination was fully consummated before 1972. In *Shehadeh* v. *Chesapeake & Potomac Telephone Co.*, 595 F.2d 711 (D.C. Cir. 1978), the plaintiff alleged that "certain critically-situated personnel" employed by the defendant engaged in "a practice * * * of maliciously and discriminatorily forestalling her employment with others" by disseminating false references, numbering perhaps 200. See *id.* at 719, 723, 725. Petitioner, by contrast, alleges no more than four discrete discriminatory acts, undertaken over a period

c. Petitioner also asserts (Pet. 17-23) that the district court erred in denying his post-judgment motion for reconsideration. This motion was based on the district court's decision in *Clark* v. *Alexander*, 489 F. Supp. 1236 (D.D.C. 1980), aff'd in part and rev'd in part, 665 F.2d 1168 (D.C. Cir. 1981), which held that one of petitioner's co-workers in the Army's Office of Employment Policy and Grievance Review had been discriminated against because of her sex and because she was involved in the enforcement of the equal employment opportunity program. *Clark* was decided more than one year before the district court entered summary judgment against petitioner; petitioner does not explain his failure to invoke the decision for so long. We are informed that the evidence in *Clark* was developed over a six-year period; during four of those years, petitioner was employed in the same office as the plaintiff in *Clark*.

Moreover, as the district court (Pet. App. 23a-24a n.*) and the court of appeals (*id.* at 21a-22a) noted, petitioner has failed to explain why the *Clark* decision entitled him to reconsideration, or why it is relevant to his claim at all. Unlike petitioner, the plaintiff in *Clark* was a woman, and in any event petitioner does not assert that he was discriminated against because of his sex. It is unclear whether petitioner believes he was discriminated against because of his equal employment opportunity activities (compare Pet. 18-19 with Pet. 20), but petitioner suggests no reason to believe that he was excusably unaware of such discrimination until *Clark* was decided. Petitioner asserts that until *Clark* was decided, "he was * * * unaware of the fact that a federal court had found that * * * the discrimination he had

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of four years by different people. Indeed, to the extent petitioner urges that each of the four acts was the outgrowth of the alleged secret file, he has arguably claimed only a single discriminatory act — the compiling of that file. See note 1, *supra*.

suffered as a Jew * * * was being perpetuated" (Pet. 20). But the court in *Clark* — which was not a class action and involved no claim of religious discrimination — made no such finding; any analogous finding about the *Clark* plaintiff had, at most, limited precedential effect that was irrelevant to the issue on which summary judgment was granted and which the district court and the court of appeals were free to disregard; and petitioner does not explain why (or even assert that) he was excusably unaware of the alleged perpetuation of discrimination against him.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

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